No. 9459

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT /3

UNITED STATES OF AMERICA,

Appellant

v.

HAGAN AND CUSHING COMPANY,

Appellee

On Appeal From the District Court of the United States For the District of Idaho

BRIEF FOR HAGAN AND CUSHING COMPANY

MAURICE H. GREENE,
Residence: Boise, Idaho.
J. H. FELTON,
Residence: Moscow, Idaho.
Counsel for Appellee.

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JURISDICTION

Appellee concedes jurisdiction of the Court to entertain this appeal.

STATEMENT OF THE CASE

On June 13, 1939, the United States of America instituted this action against the Hagan and Cushing Company in the District Court for the District of Idaho, Central Division, to recover the sum of $2284.68 allegedly paid by appellant to appellee for hog processing taxes. (R. 2-4). To the complaint appellee filed its

motion to dismiss "for failure of the complaint on file herein to state a claim upon which the relief sought can be granted." (R. 77). On September 29, 1939, the Court entered its order denying the motion to dismiss (R. 81), its written opinion being found in 29 Federal Supplement 564. Thereafter appellee filed its answer admitting certain portions of the complaint and denying other portions (R. 5-6), and on November 8, 1939, the cause proceeded to trial before a jury. At the close of the evidence offered by the Government, appellee moved for a directed verdict under Rule 50 of the Revised Rules of Practice (R. 71), which motion was granted by the Court, and thereupon judgment was entered in favor of appellee and against appellant. (R. 7).

The issues framed by the complaint and the answer are comparatively simple. Defendant admitted Paragraph 1 of the complaint, which alleged that between April 22, 1935, and November 20, 1935, defendant entered into a number of contracts with the United States Government for the delivery of certain pork and pork products to the Government, all of which contracts contained the following provision:

> "Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the materials on this bid." (R. 3-5).

Paragraph 2 of the complaint alleged that certain rates of processing tax had been fixed by the Secretary of Agriculture under the supposed authority of the Agri-

cultural Adjustment Act prior to the time the various contracts between the Government and the defendant were entered into and that:

> "Defendant delivered the supplies pursuant to the contract and plaintiff paid to the defendant the full prices bid, *which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that Act* on the products furnished by defendant to plaintiff." (R. 3).

Defendant admitted delivery of the supplies pursuant to the contracts and that the Government paid the prices named therein, but *denied "that the full prices bid included any amounts for processing taxes and alleges that the bid prices did not include processing taxes in any amount whatsoever."* (R. 6). The allegations of paragraph 3 of the complaint were admitted with the exception "that any processing tax in any amount whatsoever was included in the bid price paid by plaintiff to defendant." (R. 6).

Upon the trial of the case the only evidence offered by the Government was a series of exhibits to establish the material allegations of its complaint. The first twelve of these exhibits were certified copies of the twelve contracts for the sale of certain meat supplies by the Hagan and Cushing Company to the Government, each of which contracts contained a paragraph similar to the

following provision quoted from the eleventh contract and which appears on page 50 of the record:

> "Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (or invoices) as separate items. (This provision will be included in the contract.)
>
> "Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid."

Exhibit No. 13 was a certified copy of certain hog regulations issued by the Secretary of Agriculture under the supposed authority of the Agricultural Adjustment Act (R. 57). This original exhibit has been certified to this Court.

Exhibit No. 14 was a certified copy of certain correspondence between the Hagan and Cushing Company

and the Claims Division of the Government (R. 58). This exhibit has not been printed in the record.

Exhibit No. 15 was a certified copy of a form of "Certificate of Settlement" of the General Accounting Office, setting up the amount of pork products included in each contract, the amount of alleged processing tax applicable and the amount of the alleged overpayment by the Government to the Hagan and Cushing Company (R. 59-67).

Exhibit No. 16 was a copy of a demand made by the United States District Attorney for the District of Idaho upon the Hagan and Cushing Company for the payment of the sum alleged due in the complaint (R. 68).

Exhibit No. 17 was a certified copy of certain hog regulations issued by the Secretary of Agriculture under the purported authority of the Agricultural Adjustment Act, which original exhibit has been certified to this Court and is not printed in the record (R. 69, 75-76).

Exhibits 13 and 17, taken together, are supposed to establish the rates of processing tax on pork products under the Agricultural Adjustment Act.

The seventeen exhibits having been received in evidence, the Government rested its case (R. 71), and thereupon counsel for the defendant, Hagan and Cushing Company, moved for a directed verdict "upon the ground that the plaintiff has failed to offer any evidence to establish this portion of the allegations of paragraph 2

of their complaint which reads: 'Defendant delivered the supplies pursuant to the contracts and plaintiff paid to the defendant the full prices bid, which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that act on the products furnished by defendant to plaintiff.' And that allegation being denied, it was incumbent upon the Government to establish by evidence that the bids made by Hagan and Cushing Company which were the amounts paid by the Government to Hagan and Cushing Company, actually included some items of amount which was or constituted processing taxes." (R. 71-72).

In sustaining the motion for a directed verdict the trial court held the provision in the contract that the bid prices included taxes theretofore imposed by Congress could not be held to be binding upon the defendant to establish that unconstitutional processing taxes were actually included if the provisions of the contract that the government was to pay certain sums for the purchase of the meat products were not binding upon the government. (R. 72-74). Stated another way, the court held, if the government could repudiate the contract so as to recover the amount of any alleged processing taxes included in the bid prices, then the defendant had the right to submit bids which did not include processing taxes and the clause in the contract reciting that taxes theretofore imposed by Congress were included in the

bid price was not an admission that the unconstitutional tax was, in fact, included in the prices bid. The court thereupon instructed the jury to bring in a verdict for the defendant and from a judgment entered on the verdict so rendered this appeal is taken (R. 75).

POINT I

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AGAINST THE DEFENDANT AND APPELLEE'S MOTION TO DISMISS SHOULD HAVE BEEN SUSTAINED.

SUMMARY OF ARGUMENT

It is settled law that this court reviews only the judgment of the lower court, not the reasons given for the entry of such judgment. In this case the bill of complaint failed to state a cause of action for the reason that the contracts in question show that only lump sum prices were agreed upon by the government and the Hagan and Cushing Company, without segregation of processing taxes, and the contracts contained no provision that the Hagan and Cushing Company would pay to the government any amount of the bid prices in the event the processing taxes were held unconstitutional. In the absence of a clause whereby the seller agreed to pay the purchaser the amount of the unconstitutional tax the purchaser cannot recover and the court should have sustained appellee's motion to dismiss.

Ismert-Hincke Milling Co. vs. U. S. (U. S. Ct. Cl., Decided November 6, 1939).

ARGUMENT

It is a general rule that this Court will affirm a judgment of the District Court if that judgment is correct, irrespective of the ground upon which it may have been granted by the District Judge.

This Court in U. S. vs. Heinrich, 16 Fed. (2d) 112 (113) said:

> "But, while conceding that the complaint states no cause of action, and that the judgment itself is correct, the government insists that it should not hereafter be confronted by an adjudication of the court below, based upon the ground that the earlier act is unconstitutional and void. But this court sits in review of final judgments, not of opinions, and, if the judgment itself is conceded to be correct, we cannot and will not inquire into the reasons assigned therefor. As said by the Supreme Court in Dinsmore v. Southern Express Company, 183 U. S. 115, 121, 22 S. Ct. 45, 47 (46 L. Ed. 111):
>
> " 'As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the Circuit Court, and the judgment

must be affirmed without costs in this court; and it is so ordered.' "

The Eighth Circuit lays down the rule as follows:

> "This court, however, is not bound by the reasons assigned by the trial court in directing a verdict. A rule to the contrary would call for a reversal of this case. There is no duty devolving upon the trial court in directing a verdict to assign reasons therefor. If for any purpose he sees fit to do so, although his reasons of law or fact are incorrect, it is not error, if upon the record the appellate court finds the verdict was proper."
>
> Smith vs. S. S. Kresge Co., 79 Fed. (2d) 361 (362, 363).
>
> See also:
>
> Clinton Mining Co. vs. Cochran, 247 Fed. 449
> Eureka County Bank vs. Clarke, 130 Fed. 325.
> Boise Water Co. vs. Boise City, 213 U. S. 276.

In this case, we believe that appellee's motion to dimiss the bill of complaint should have been granted and, irrespective of other grounds for affirming the judgment, this Court should hold that the judgment should be affirmed for the reason stated in appellee's motion to dismiss "for failure of the complaint on file herein to state a claim upon which the relief sought can be granted." (R. 77). Prior to the argument on appellee's motion to dismiss and in response to its motion for a

bill of particulars, the Government filed with the clerk of the court certified copies of the contracts involved so that they were available to the trial court upon the hearing of the motion to dismiss. The contracts disclosed that the bids submitted by the Hagan and Cushing Company and accepted by the Government were lump sum bids, in that no segregation of any processing taxes from the bid prices was made. (R. 15-20). Further, there was no provision in the contracts that the Hagan and Cushing Company would pay the Government any amount, whether for processing taxes or otherwise, in the event the Agricultural Adjustment Act or any other tax act should be held unconstitutional subsequent to the execution of the contracts. In a long series of cases it has been held that where the sales price of the goods is a lump sum or composite price so that any processing tax included in the sales price cannot be segregated therefrom, and in the absence of a provision in the contract that if any tax statute were held unconstitutional the amount of the tax, if any, included in the bid price would be repaid by the seller to the buyer, the buyer cannot recover the amount of any alleged tax claimed to have been included in the sales price.

Cases identical with the instant one, in that they involved actions to recover amounts of processing taxes under the Agricultural Adjustment Act alleged to have been included in the contract price, in which it was held that the buyer could not recover the alleged tax, are

as follows: Moundridge Milling Co. v. Cream of Wheat Corp., 105 F. (2d) 366 (C. C. A. 10th); Continental Baking Co. v. Suckow Milling Co., 101 F. (2d) 337 (C. C. A. 7th); Cohen v. Swift & Co., 95 F. (2d) 131 (C. C. A. 7th), certiorari denied, 304 U. S. 561; Johnson v. Igleheart Bros., 95 F. (2d) 4 (C. C. A. 7th); Golding Bros. Co. v. Dumaine, 93 F. (2d) 162 (C. C. A. 1st); Casey Jones, Inc. v. Texas Textile Mills, 87 F. (2d) 454 (C. C. A. 5th); Johnson v. Scott County Milling Co., 21 F. Supp. 847 (E. D. Mo.); O'Connor-Bills v. Washburn Crosby Co., 20 F. Supp. 460 (W. D. Mo.); Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154 (App. D. C.)

An excellent statement of the rule is set forth in Cohen v. Swift & Co., supra, as follows:

> "There is no claim that the processing tax was billed to appellant as a separate item, but it is claimed it was included and made a part of the price paid by appellant for the products purchased, and in order to sustain such claim it is alleged that wholesale prices increased when the processing tax was unpaid and decreased when such tax was removed and that the agents and representatives of appellee told appellant and their vendees and customers that the processing tax was included in the purchase price. The bill contains no allegation as to whether such tax included in the price at which it sold the products in question to its vendees; neither

is any agreement, express or implied, alleged, whereby appellee agreed to pay to appellant and those like situated the tax so imposed."

The District Court in passing on appellee's motion to dismiss distinguished the foregoing cases from the case at bar on the ground that a distinction existed in the Government being a party to a contract rather than a private individual and, while conceding the correctness of the foregoing decisions as applied to contracts between private parties, reached the opposite conclusion where one of the parties was the Government. We see no reason for the distinction made by the District Court, for, as was pointed out in United States v. Helvering, (C. C. A. D. C.) 85 Fed. (2d) 230, the government in seeking to recover taxes stands no higher in this court than a private individual. In the cited case the court said:

"Obviously this is inequitable and ought not to be done unless required as a matter of law. In saying this much, we are not influenced by the fact that the government is itself a party or that the subject we are dealing with is taxation. The result to be reached should be wholly uninfluenced by those facts. When the United States is properly a party in a litigation in its own courts, it occupies no different or better position than the humblest citizen. Overreaching on its part should be no more condoned than if practiced by an individual. We have

said as much before. O'Laughlin v. Helvering, 65 App. D. C. 135, 81 F. (2d) 269. Impelled by these considerations, we proceed to a discussion of the case as made."

The Attorney General in his brief in this case, the same as the District Court in its memorandum opinion on appellee's motion to dismiss, urges a distinction between the Government as a party to a contract and a private individual. However, two days before the trial of this action on the merits, in a case identical in every respect with the instant case, the Court of Claims of the United States decided the case of Ismert-Hincke Milling Company v. The United States, (decided November 6, 1939, and not yet reported) and there held that in the matter of contracts of this nature no distinction could be made in the right of the Government to recover alleged processing taxes and the right of a private individual. Justice Green, in rendering the unanimous opinion of the Court of Claims, said:

"It is also argued on behalf of the defendant that by reason of plaintiff having failed to pay the processing taxes involved in the six completed contracts there was a want of consideration for the payments made thereon to that extent, and the plaintiff having been paid in full, the Comptroller General rightfully held that there had been an overpayment upon which the amount due on the contracts on which plaintiff brought suit could be

credited. But this contention is negatived by the authorities which hold that where there is but one price fixed by the contract and no separation of the tax, the tax has been absorbed in the price and that the purchaser merely pays the price demanded for the goods. In such cases there can be no implication outside of the terms of the contract. *It should be kept in mind in this connection that the contracts upon which suit was brought contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff.* The grounds for any change in the price were stated clearly and without ambiguity, leaving nothing to be inferred or implied. While some verbal differences may be found in the terms of the contracts involved in the cases cited to support plaintiff's contentions, these differences do not affect the principle laid down therein or the rules which determine defendant's right to recover."

On the contention urged that a distinction exists between contracts to which the Government is a party and contracts between private individuals, Justice Green said:

"It seems to be considered by the attorneys for the defendant that the fact that the Government was a party to the contracts in suit makes the rule we have laid down above inapplicable, and as a

basis for the argument made by defendant it is said that in private contracts it is immaterial to the vendee whether the taxes are paid or not. With this statement we do not agree. In all of the cases which we have cited the foundation on which the action was laid was that the tax had not been paid. In our opinion, the fact that the defendant in the case at bar would have received the tax if it had been paid is entirely immaterial."

The Ismert-Hincke case cannot be distinguished from this case. The clauses of the contracts here in question are identical with the clauses in that case. In each instance the seller had not paid the Government any processing tax. In each instance the contracts were fully executed before the decision of the Supreme Court of the United States invalidated the processing tax provisions of the Agricultural Adjustment Act. Therefore, this Court must determine whether it will follow the decision of the Court of Claims in the Ismert-Hincke case or the decision of the District Court below on appellee's motion to dismiss. The decision of the District Court is the only decision of which we are aware (some district court decisions have been reversed on appeal) upholding the right of the buyer to recover the amount of the tax from the seller where no segregation of the processing tax was made from the bid price in the contracts and there was no stipulation in the contract that if the tax statute was held unconstitutional, the

seller would refund the amount of tax to the buyer.

As pointed out above, the Government is in no different situation in this case than a private individual. Its contracts have no greater standing in a court than the contracts of a private individual. Had the Government seen fit to do so, it could have included in the contracts a provision that, if for any reason any tax included in the bid price was held invalid, the amount of such tax would be refunded by the seller to it. In the absence of such a stipulation, we submit that the Government agreed to buy pork products at a certain amount per pound, that it paid exactly the agreed price for such products, that there is no reason now existent for the Government claiming that it paid for something other than meat products, or that it paid at a greater rate than the contract provided for. The District Court's decision on the motion to dismiss that the Government can recover the amount of the processing tax from the seller is at variance with the judgment of practically every Circuit Court in the country as well as the United States Court of Claims, and we submit that its final decision on the merits that the Government cannot recover alleged processing taxes from the seller should have been its decision on appellee's motion to dismiss, and, for that reason, that the judgment of the District Court denying the Government the right to recover should be affirmed.

POINT II

THE PROCESSING TAX PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT BEING UNCONSTITUTIONAL WERE VOID FROM THEIR INCEPTION AND THE CONTRACTS DID NOT PROVE THAT THE VOID TAX HAD, IN FACT, BEEN PAID TO APPELLEE AS A PART OF THE CONTRACT PRICE OF THE GOODS.

SUMMARY OF ARGUMENT

The Government assumed the burden of proving that the bids of the Hagan and Cushing Company did include processing taxes for it alleged in Paragraph 2 of the complaint that the bid prices "included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes * * *" (R. 3). This allegation was denied in defendant's answer. (R. 6).

The Agricultural Adjustment Act, being unconstitutional and of no legal force, did not require the Hagan and Cushing Company in complying with the provisions of the contract "that prices bid herein include any federal tax heretofore imposed by the Congress" to include the void processing tax in the prices bid. This action, conceded by the Government to be an action for money had and received, rests on equitable principles and it was incumbent upon the Government to prove that the Hagan and Cushing Company had in its posses-

sion moneys which in justice and good conscience belonged to the Government. The contracts themselves only refer to applicable taxes and it was incumbent upon the Government to prove that the bid prices did, in fact, include processing taxes. The Government concededly offered no evidence of this nature and in the absence of any evidence that the bid prices did include amounts representing the unconstitutional tax, the Government failed to establish the allegations of its complaint and the judgment of the District Court should be affirmed.

ARGUMENT

A summary of the Government's argument is that defendant did not pay any processing taxes to the Government for pork products sold by it between the months of April and November, 1935; that the Agricultural Adjustment Act was not declared unconstitutional by the Supreme Court of the United States (although there were a large number of district court and circuit court decisions rendered before the decision of the Supreme Court of the United States) until January 6, 1936, (United States v. Butler, 297 U. S. 1, 80 L. Ed. 477, 56 Supreme Court 312, 102 A. L. R. 914), that since the Agricultural Adjustment Act had not been declared unconstitutional by a court of last resort until after the twelve contracts in question had been performed and the bid prices paid, the Hagan and Cushing Company did not have the right to disregard

the provisions of an unconstitutional statute and submit bids to the Government without processing taxes being included; and that the clause in the contract that prices bid included taxes theretofore imposed by Congress is binding upon the defendants that the bid prices did include the unconstitutional processing tax.

The issue in this case is whether the defendant had the right to disregard the unconstitutional Agricultural Adjustment Act before the decision of the Supreme Court of the United States (United States vs. Butler, supra) in submitting bids on the contracts in question. If so, then it was justified in submitting bids without processing taxes being included therein; and in order for the Government to recover in this action it had the burden of establishing as a matter of fact that processing taxes were included in the bid prices. Appellant assumes that from the time of enactment of the Agricultural Adjustment Act in 1933 to the date the Supreme Court rendered its decision in the Butler case on January 6, 1936, the unconstitutional processing taxes were in full force and effect. This appears repeatedly throughout appellant's brief. On page 6 of its brief appellant says: "On various dates subsequent to the enactment of the Agricultural Adjustment Act and the imposition thereunder of processing taxes upon hogs, *and while such processing taxes still were in effect,* the appellee entered into certain contracts with the United States Government * * *"

The Federal Courts have established and followed the rule that an unconstitutional law is invalid from the time of its enactment. In Norton v. Shelby County, 30 L. Ed. 178, 118 U. S. 425, the Supreme Court said:

> "An unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In C. & I. L. Railway Company v. Hackett, 228 U. S. 559, 57 L. Ed. 966, the same Court said:

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

In El Paso Electric Company v. Elliott, 15 Fed. Supp. 81, the Court said:

> "Where a statute, in this instance an act of Congress, is held by the court, as in this instance to be invalid and unconstitutional 'in toto', the act falls, and, in falling, carried with it all remedies or attempted remedies as provided therein, in effect the same as if never enacted or in existence."

The general rule is stated in 16 Corpus Juris Secundum, at page 287, as follows:

> "Generally speaking, a decision by a court of

> last resort that a statute is unconstitutional has the effect of rendering such statute absolutely null and void; the act is as inoperative as if it had never been passed, and it is regarded as invalid from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

The Government seeks to void the effect of these decisions by citing cases involving rights arising through parties dealing with an unconstitutional statute on the assumption that the statute was in fact constitutional. We do not believe such cases to be authority in the instant proceeding. The provisions in each of the contracts sued upon in this proceeding contain the following provision:

> "Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid."

The quoted provision of the contract did not state that the bid prices included any amounts for the Agricultural Adjustment Act taxes but only for taxes "heretofore imposed by Congress." The processing taxes levied under the Agricultural Adjustment Act being unconstitutional, the contract provision did not require the Hagan and Cushing Company to include processing taxes in its bid, for Congress never legally imposed any Federal tax by the provisions of the Agricultural Adjustment Act. It must follow that the tax clause above quoted was not conclusive that processing tax was in fact

included in the bid prices. Therefore, in order for the Government to recover it had to go farther than the terms of the contracts and show that processing tax was in fact included in the bid prices before it had established that the defendant had received anything more than the sales price of the merchandise. This is patent from the allegations in the Government's complaint in which, irrespective of the contract provisions, it affirmatively alleged that the bid prices "included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes * * *" (R. 3).

The Government in its brief admits that this is an action for money had and received and with that position appellee agrees. It is well established that an action for money had and received is governed by equitable principles. The issue in such a case is: Does the proof show that the defendant has money which in equity, justice and good conscience belongs to plaintiff?

In Crossett Lumber Company v. United States, (8th Cir.), 87 Fed. (2d) 930, it was held:

> "An action to recover taxes is in the nature of an action for money had and received. Although in form it is an action at law, it is governed by equitable principles. (citing cases) *In such an action a plaintiff cannot recover unless he can show that in equity and good conscience he is entitled, as against the defendant, to the money. Such an action*

'aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff.' Claplin vs. Godfrey, 21 Pick. (38 Mass.) 1, 6, quoted with approval in the Jefferson Electric Co. Case, supra. In this case the appellant has failed to establish such an equitable right to recover."

In Champ Spring Co. vs. United States, (8th Cir.), 47 Fed. (2d) 1, an action to recover taxes, the court said:

"As has been observed the plaintiff's action is in the nature of a suit for money had and received. While this is in an action at law, it is governed by equitable principles, and it can be maintained only when one has money in his hands belonging to another, which in equity and conscience he ought to pay over to another. The issue in this case is: *To whom does the money in equity, justice and good conscience belong? If the plaintiff fails to show that it has a superior right to that of the defendant, it cannot recover.*"

and

"*It was therefore incumbent upon the plaintiff, to entitle it to recover, to show, not that the defendant had by some illegal method secured these funds, but that the plaintiff had a better right to them than the defendant.*"

In White v. Stone, (1st Cir.), 78 Fed. (2d) 136, the Court said:

> "It is well settled that an action to recover taxes alleged to have been illegally collected is, essentially, an action for money had and received and is equitable in character *and that it devolves upon the plaintiff in such an action to establish that in justice and equity the money sued for belongs to him.*"

The general rule is stated in 41 C. J., at page 68, as follows:

> "The burden is on plaintiff to prove that the money has been received by defendant, or at least some proof must be made from which such an inference can be drawn. So the burden is on plaintiff to show that the money was received for the use of plaintiff and that he is legally entitled to the money."

In Atlantic Coast Line R. Co. v. Florida, 79 L. Ed. 1451, 295 U. S. 301, the Court said:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (citing cases) The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense in equity and good conscience if permitted to retain it. (citing cases) The question no longer is whether the law

would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

In United States v. Jefferson Elec. Mfg. Co., 78 L. Ed. 859, 872, 291 U. S. 386, the Court said:

"The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:

" 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money which ex aequo et bono belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.' "

See also:

American Newspapers vs. U. S., 20 Fed. Supp. 385, 393.

White vs. Stone, Collector, (1st Cir.), 78 Fed. (2d) 136.

Hammermill Securities Corp. vs. Noel, 20 Fed. Supp. 402, 403.

First Nat'l. Bank vs. U. S., 12 Fed. Supp. 301.

Keyes vs. First Nat'l. Bank, (8th Cir.), 25 Fed. (2d) 684.

Myers vs. Hurley Motor Co., 273 U. S. 18, 71 L. Ed. 515, 47 Sup. Ct. Rep. 277.

Has the Government proven the allegation in Paragraph 2 of its complaint that "defendant delivered the supplies pursuant to the contracts and paid to the defendant the full price bid, *which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that Act * * **"?

For the purpose of clearly placing before the Court defendant's position, let us assume for argument's sake that the defendant in submitting the various bids did not include processing tax. If we refer to page 15 of the record and the bid there shown, it will be noted that the unit price bid on bacon was .35[1] a pound. The Government claims that .0429 of the .35 bid represented processing tax. (R. 65). If the Government is permitted to recover in this action, the price the Hagan and Cushing

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[1] All prices are decimals of one dollar.

Company would receive for the bacon would be .3071 per pound. If the bid price of .35 did not include anything for processing taxes, then to permit the Government to recover in this action would reduce the price of bacon to the Hagan and Cushing Company by approximately one-sixth, and the Hagan and Cushing Company would be paying the Government a tax which it had not received in the sale price of the product. If, in fact, the sale price of the product was .3071 per pound, then the Hagan and Cushing Company was overpaid to the extent of the tax. But upon whom did the burden rest of establishing that the sales price of the bacon was .35 per pound or .3071 per pound? We submit the record is devoid of any evidence of whether the sale price was .3071 or .35, or whether the defendant made any allowance whatsoever for processing taxes in submitting its bid price of .35. As shown by the foregoing authorities the burden was upon the Government to establish that in justice and equity the Hagan and Cushing Company had, in fact, been paid the processing tax and by its complaint the Government conceded the rule by affirmatively alleging that the bid prices did include processing taxes. The record may be searched from cover to cover for any evidence tending to establish proof of this fact and nothing will be found that the Government paid the Hagan and Cushing Company any amount whatsoever for processing taxes. We submit the Government cannot take the position on the one hand that the provision in the contract that bid prices included Federal taxes is

binding and that the Hagan and Cushing Company did make allowance in the bid prices for processing tax; while on the other hand the Government takes the position that its agreement in the contract to pay the bid prices is not binding upon it to the extent that it may have paid any amount for processing taxes. If the tax clause in the contract is binding upon Hagan and Cushing Company as proof that it did include the unconstitutional tax in the prices bid, then we submit the Government's agreement to pay the bid prices is equally binding upon the Government. If, on the other hand, the agreement of the Government to pay the bid prices for the pork products is not binding upon it so that it can recover any processing taxes actually paid, then we submit the tax clause is not evidence that the Hagan and Cushing Company did in fact include processing taxes in the bid prices. We think the law is well settled that

> "A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand, while he shirks its disadvantages on the other."
>
> 13 C. J. 623.

CONCLUSION

In its conclusion in its brief appellant says the decision of the court below is wrong, that it is not supported by the facts and the law and should be reversed. In answer appellee says that the decision of the district court is in accord with every decided case in which an attempt was made by a buyer to recover from a seller amounts claimed to have been paid for processing taxes under the Agricultural Adjustment Act where the contracts in question did not contain an agreement on the part of the seller that he would repay the buyer the amount of any processing taxes included in the sales price. Appellant desires to have this court depart from what may now be said to be the overwhelming weight of authority of the Federal Courts on this question and to arrive at a conclusion that because the United States happened to enter into a number of contracts for the purchase of products on which Congress endeavored to levy processing taxes that the Government should be elevated to the unique position of being able to recover the amount of such taxes while the private individual cannot. A Government contract is no different than a private contract in that the rights of the parties must be determined by the terms of the contract. We submit that these contracts should be judged under the guiding principles of previous decisions of other Federal Circuit

Courts and the United States Court of Appeals and that the judgment appealed from should be affirmed.

Respectfully submitted,

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MAY, 1940.

Service of the foregoing this.....day of May, 1940, is hereby acknowledged.

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Counsel for Appellant.